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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1935.

No. 772.

Howard Morf, doing business under the firm name and style of Pacific Wholesale Automobile Company,

Appellant,

vs.

John D. Bingaman, Commissioner of Revenue for the State of New Mexico,

Appellee.

BRIEF ON BEHALF OF APPELLANT

RALPH K. PIERSON,
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Compton, Calif.;
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HARRY S. BOWMAN,
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vs.

John D. Bingaman, Commissioner of Revenue for the State of New Mexico,

Appellee.

BRIEF ON BEHALF OF APPELLANT
With Appendix.*

On appeal from the District Court of the United States for the District of New Mexico.

OPINION BELOW.

This cause was tried before a specially constituted District Court of the United States (Judicial Code, section 266; U. S. C., Title 28, section 380) and the opinion of

* Italics ours unless otherwise noted.

such District Court is reported in 12 Fed. Supp. 755 [R. 31-37]. The dissenting opinion of the Honorable Franklin C. Kennamer, District Judge, is reported at page 759 [R. 38-39].

STATEMENT OF THE CASE.

Appellant, plaintiff below, filed his Bill of Equity in the United States District Court for the District of New Mexico [R. 1-12], and later filed an Amendment to said Bill in Equity [R. 13-15], seeking to enjoin John D. Bingaman, as Commissioner of Revenue for the state of New Mexico, from enforcing Chapter 56 of the 1935 Session Laws of the state of New Mexico against the appellant in his interstate commerce operations, in so far as the same relates to the use of the highways of the state of New Mexico for the purpose of selling or offering the same for sale, as in section 1, subdivision (d) of said Chapter 56 provided.

Subdivision (d), section 1, of said Chapter 56, forbids any person to use the highways of the state for the transportation of any motor vehicle on its own wheels for the purpose of selling or offering the same for sale unless such vehicle is licensed by the state of New Mexico or is owned by an automobile dealer, duly licensed by the State of New Mexico and is operated under a dealer's license, without securing a special permit as therein authorized and paying the fees therein required. [R. 9-10; Appendix, Exhibit 1.]

The defendant filed his return to the rule to show cause and answer to the bill [R. 19-30] wherein many of the allegations of plaintiff's bill were admitted and some were denied. Defendant also, by his answer, set up several

defenses. A stipulation of facts [R. 42-50], ultimate in character, was entered into by the parties subject to the right to object thereto on the ground of irrelevancy or immateriality. In addition thereto, oral testimony was introduced by both parties at the time of the trial of the cause [R. 50-53].

Prior to the time of defendant's filing said return and answer, a temporary restraining order was issued [R. 16-17], and upon a hearing set upon the rule to show cause, it was agreed in open court between the court and parties plaintiff and defendant that the matter should then and there be heard upon its merits, and that the judgment of the court should be final upon the question of whether a permanent injunction should be granted or denied.

SUMMARY OF FACTS.

Appellant is a citizen and resident of the city of Los Angeles, California, and is engaged therein in the wholesale automobile business [R. 43]. He is not engaged in business in the state of New Mexico [R. 44]. In the operation of his business appellant purchases automobiles in various eastern and southern states of the United States, and causes them to be driven on their own wheels either under their own power, or in tow of another vehicle over the public highways to his place of business in California, for the purpose of sale and trade [R. 43-44]. Said automobiles are so transported through the state of New Mexico, entering at the city of Las Cruces, and departing from the state at Lordsburg, a distance of approximately one hundred sixty-six (166) miles [R. 44]. In causing said automobiles to be driven through the

state of New Mexico as aforesaid, appellant is engaged solely in interstate commerce [R. 33 and 45]. The vehicles are themselves the subject of such commerce. The appellee, defendant below, John D. Bingaman, is Commissioner of Revenue of the state of New Mexico, and is the official charged with the enforcement and collection of the fees specified in said subdivision (d), section 1, Chapter 56. In addition hereto, the stipulated facts refer to the manner in which appellant's motor vehicles are transported through the state of New Mexico [R. 46], and the cost to the said state of the maintenance of its highway facilities [R. 47-49]. Appellant objected and excepted to the admission of certain of these stipulated facts upon the ground of immateriality [R. 50]. The oral testimony was very brief, consisting of testimony by appellant with respect to the operations of his business [R. 50-51], and of a state police officer with respect to what is termed "caravan" operations on the highways [R. 52-53].

THE RULING OF THE DISTRICT COURT.

The trial court, in the findings of fact [R. 30-31] adopted the stipulation of facts theretofore entered into and found them all to be true [R. 31]. The court held that Chapter 56 was not unconstitutional in any of the respects alleged by plaintiff [R. 35-36], and further held that said Chapter 56, in so far as it affects this appellant, was not repealed by Chapter 136 [R. 36-37]. In holding said Chapter 56 not repealed by Chapter 136, the District Court held that the mileage tax required by section 8, Chapter 136, is supplemented by the flat fee or "special permit" tax provided by Chapter 56, and that appellant is subject to both taxes, as they are in harmony and

operate together [R. 37]. The opinion of the court was adopted as its conclusions of law, and for the reasons indicated therein, appellant's bill was dismissed for lack of equity [R. 37], and a decree was entered [R. 40] dissolving the temporary injunction, assessing damages, and dismissing the bill of complaint. Appellant duly excepted to the ruling of the trial court and filed his bill of exceptions [R. 41-55].

SPECIFICATIONS OF ERROR.

I.

The District Court erred in entering its decree of December 24th, 1935, and therein dismissing appellant's petition and denying to appellant a permanent injunction, permanently enjoining the appellee, as Commissioner of Revenue of the State of New Mexico, from enforcing as against appellant, in his interstate commerce, the collection of the tax provided in Chapter 56 of the 1935 Session Laws of New Mexico.

II.

The District Court, by the entry of its decree, erred in ruling that Chapter 56 of the 1935 Session Laws of the State of New Mexico, in so far as said Chapter 56 purports to apply to appellant in his interstate commerce, was not repealed by Chapter 136 of the 1935 Session Laws of said State.

III.

The District Court, by the entry of its decree, erred in denying to this appellant his rights under, and the protection of the interstate commerce clause of section 8 of article I of the Constitution of the United States.

IV.

The District Court, by the entry of its decree, erred in permitting this appellant to be deprived of his property without due process of law, in violation of his rights under the Fourteenth Amendment to the Constitution of the United States.

V.

The District Court, by the entry of its decree, erred in denying to this appellant the equal protection of the laws to him guaranteed in the Fourteenth Amendment of the United States Constitution.

VI.

The District Court erred in making its finding of fact number 1 over the appellant's written objections and exceptions to the admissibility of certain of the stipulated facts, which objections and exceptions were filed herein on the 17th day of September, 1935.

VII.

The District Court erred in making its findings of fact numbers 2, 3, 4 and 5, over plaintiff's written objections and exceptions thereto, which said objections and exceptions were filed herein on the 18th day of December, 1935.

VIII.

The District Court erred in entering its said decree upon the insufficient findings of fact by it made in this cause.

SUMMARY OF ARGUMENT.

1. **Chapter 136, Laws 1935, Repeals Chapter 56, Laws 1935, In So Far as the Earlier Act Relates to the Interstate Commerce of Appellant and the Exaction of the Tax Therein Laid Is Violative of the Fourteenth Amendment to the Constitution of the United States.**

A comparison and study of Chapter 56 of the 1935 Session Laws, which became effective February 21st, 1935, and Chapter 136 of the same Session Laws, commonly known as the "Port of Entry Act," reveals that the former act is repealed by the latter. The mileage tax provided in the Port of Entry Act was intended entirely to supersede the flat tax exacted under Chapter 56. The Port of Entry Act is a valid exercise of the power of the state, and a studied substitute for Chapter 56, designed to avoid the unconstitutional interference with interstate commerce accomplished by subdivision (d), Chapter 56. The subject matter of the two acts is the same, and under the rule *expressio unius est exclusio alterius*, the mileage tax in the Port of Entry Act takes the place of the flat tax provided by Chapter 56. While repeals by implication are not favored, the Port of Entry Act effects such a repeal under the authorities cited. By exacting from appellant a tax under authority of a repealed statute, appellee deprives appellant of his property without due process of law. The District Court erred in holding that Chapter 56 was not repealed by Chapter 136, in so far as the same relate to the interstate commerce of appellant.

2. Chapter 56 of the 1935 Session Laws of the State of New Mexico Is Unconstitutional and Void as Repugnant to Section 8 of Article I of the Constitution of the United States, in Denying to Appellant His Rights Under the Interstate Commerce Clause.

The tax imposed is upon the privilege of engaging in interstate commerce. A tax upon motor vehicles engaged exclusively in interstate commerce, for the use of public highways, is valid only if compensatory, and therefore, must necessarily be predicated upon the use made, or to be made, of the public highways, or as cost of the policing thereof, occasioned by such use. This alone, however, is not sufficient. The tax cannot be upheld if it constitutes a discrimination against interstate commerce. The tax under Chapter 56 is not compensatory, nor predicated upon the use made of the public highways. It is discriminatory and unreasonable. It is a tax upon goods, to wit: motor vehicles, in transit, the subject of interstate commerce. Its effect is to raise an illegal economic barrier against products originating in states other than New Mexico. The District Court erred in holding that Chapter 56 was not unconstitutional as repugnant to the Interstate Commerce Clause.

3. **Chapter 56 of the 1935 Session Laws of the State of New Mexico Is Unconstitutional and Void as Repugnant to Section 1 of the Fourteenth Amendment of the Constitution of the United States in That It Denies to Appellant the Equal Protection of the Laws.**

The statute unfairly discriminates against appellant's interstate commerce, and in favor of intrastate commerce carried on by automobile dealers of New Mexico, and the District Court erroneously held that resident dealers could not, under the provisions of the statute, caravan automobiles into the state without payment of the tax. No proper classification is created by the statute. The attempted classification is defined by two limitations, (1) "Any motor vehicle on its own wheels." (2) "For the purpose of selling or offering the same for sale." Such classification does not rest upon distinctions having a fair and substantial relation to the object sought to be accomplished by the legislation, and the same is arbitrary and unreasonable. No attempt is made by the statute to make a classification of vehicles moving in integrated fleets or groups. The classification created simply raises an economic barrier against goods seeking their market, to-wit, automobiles. The classification attempted is palpably arbitrary, capricious, unreasonable and discriminatory, and the District Court erred in holding that Chapter 56 was not unconstitutional in that it denies to appellant the equal protection of the laws.

4. **The District Court erred in Overruling Appellant's Objection to Admission in Evidence of the Facts Set Out in Paragraphs XXI, XXII, XXIII, XXIV, XXV, XXVI, XXVII, XXIX, XXX, XXXII, XXXIV and XXXVII of the Stipulation of Facts, and in Thereafter Adopting Said Stipulated Facts So Objected to, as Facts in Its Own Finding.**

In said stipulation of facts the right to object thereto on the ground of irrelevancy or immateriality was reserved [R. 49]. The facts contained in the paragraphs admitted in evidence over appellant's objections and found by the court to be true were entirely irrelevant and immaterial to the issues involved in the trial of the cause.

5. **The District Court Erred in Making Its Findings of Fact Numbers 2, 3, 4 and 5, Over Appellant's Written Objections and Exceptions Thereto.**

The said findings are not substantiated by any competent evidence in the cause, and are contrary to the evidence introduced.

6. **The District Court Erred in Entering Its Said Decree Upon the Insufficient Findings of Fact Made by It in This Cause.**

The findings made by the District Court are insufficient to support the decree.

POINT I.

Chapter 136, Laws of 1935, Repeals Chapter 56, Laws of 1935, In So Far as the Earlier Act Relates to the Interstate Commerce of Appellant, and the Exaction of the Tax Therein Laid, Violates the Fourteenth Amendment of the Federal Constitution in That It Deprives This Appellant of His Property Without Due Process of Law. (Specifications of Error Nos. I, II and IV.)

History and Discussion of the New Mexico Statutes Involved.

The whole general subject of motor vehicle registration and license in New Mexico was originally dealt with by the enactment of Chapter 119, Laws 1929, now appearing in the "New Mexico Statutes Annotated, 1929 Compilation" as sections 11-301 to 11-341, inclusive.

Section 21 of this original act (Sec. 11-321 of the 1929 Compilation) relating to the registration and license of motor vehicles of non-resident owners, was amended in 1933 and again by the enactment of Chapter 56, Laws of 1935, effective February 21, 1935. [R. 8-10; Appendix, Exhibit I.] This last amendment consisted of re-enacting the old provisions and adding thereto subdivision (d), section 1, Chapter 56, under the provisions of which the New Mexico Commissioner of Revenue, appellee herein, compels appellant to pay the tax therein provided for, as a condition precedent to appellant's use of the highways of the State of New Mexico, for the transportation of "any motor vehicle on its own wheels for the purpose of selling or offering the same for sale."

This act became a part of the original, general motor vehicle registration and licensing act (Chapter 119, Laws

1929, *supra*) and should be read in the light of the other provisions thereof. So read, its purpose is to raise revenue, rather than to effect safety in traffic and police supervision thereof.

Among the other provisions of this licensing act, section 31 thereof (Secs. 11-331, Comp. 1929) provided for the allocation and disposition of the tax collected under that act. This section 31 was successively amended by section 6, Chapter 77, Laws of 1931, by section 6, Chapter 169, Laws of 1933, and finally by Chapter 93, Laws of 1935. [Appendix, Exhibit III.]

Under the provisions of this act in its final form, each dollar exacted from appellant by appellee under the provisions of Chapter 56, Laws of 1935, is allocated and disposed of as follows:

Expense of administering general registration and licensing act (Chap. 119, Laws 1929)	$ .06
State road fund	.423
County road fund	.141
State general fund	.141
School funds, County and District	.235
	$1.00

It is thus seen that 43.6 cents are used for purposes in no way relating to the construction or maintenance of highways or to the policing thereof in the interest of public safety. Of the remaining 56.4 cents, only 42.3 can be used in maintaining state as distinguished from county highways. It is to be noted that State Highway No. 80 is the only highway within the State of New Mexico used by appellant [R. 44].

REPEAL OF CHAPTER 56, LAWS OF 1935, HAS BEEN EFFECTED.

Chapter 56, Laws of 1935, was an emergency act and was approved and became effective February 21, 1935. A week later, February 28, 1935, Chapter 136, Laws of 1935, commonly called the "Port of Entry Act," was approved. This was not an emergency act. [Appendix, Exhibit II.]

This last mentioned act speaks only of interstate commerce, concerning motor vehicles using the public highways. The act covers the "Transportation of Property" into the state and thereafter over the roads of the state by such means. (See Secs. 1, 3, 4, 5, and 6 (e).)

Ports of entry are established (Sec. 3) through which such commerce must enter, be inspected and registered (Secs. 3 and 4) and from which it may not proceed further into the state without clearance certificate (Sec. 5), and only then after the payment of a tax, based upon the mileage to be traveled within the state, and weight of vehicle, *or* upon the payment in lieu of such mileage tax, should the owner so elect, of the fees required for license plates under the general registration and license act (Chapter 119, Laws 1929), *rather than the payment of the fee required for a special permit under the provisions of Chapter 56, Laws 1935.*

This Port of Entry Act (Chapter 136) contains elaborate provisions requiring:

1. Disclosure of identity of car, operator and owner;
2. Inspection to ascertain if lights, brakes and vehicle are in such condition as permits of safe operation upon the highways;

3. Inspection of car and contents in the interests of "public safety, health, welfare and comfort";
4. Compliance with law regulating the hours of service of drivers and chauffeurs;
5. Designation of exact route to be followed.

(See Sec. 4.)

These are all police measures intended to be enacted for the purpose of public safety in appellant's use of the roads.

In addition the act requires the disclosure of the weight of the vehicle and its load and the number of taxable miles to be traveled over the route specified (Sec. 4), for the purpose of computing the mileage tax to be paid (Secs. 6 (e) and 8), and forbids more than one trip (Sec. 7).

The proceeds of this mileage tax are to be used for the administration of the act and for the maintenance, repair and reconstruction of public roads (Sec. 8). Such proceeds are thrown into a suspense fund and thereafter allocated. (Secs. 10 and 11.)

Certain acts are declared unlawful (Sec. 14) and penalties and punishments are imposed (Sec. 15).

Specifically, Section 13 of the act treats of that particular class of interstate commerce engaged in by this appellant, which, *in almost the identical wording,* is likewise covered in the earlier act by the provisions of subsection (d) of section 1, of Chapter 56. [Appendix, Exhibit I.]

Patently Chapter 136 [Appendix, Exhibit II] is a legislative effort to cover the entire subject of interstate use of highways, and to avoid all inhibitions of the Federal Constitution against the state's unconstitutional inter-

ference with interstate commerce, which inhibitions Chapter 56 had not succeeded in avoiding.

In each act, the transportation of a motor vehicle in the state, over the highways and under its own power or when being towed by another, is arbitrarily classified as a subject of taxation, but only in the event that such transportation is for the purpose of sale.

The earlier act, for this class of transportation, *fixes an arbitrary tax, which bears no relation to the extent or method of appellant's use of the roads and which is not reasonably compensatory therefor. It makes no provision for police regulation or for promoting public safety.* It speaks of both interstate and intrastate transportation.

The later act leaves untouched the provisions of the earlier, relating to intrastate transportation of the character here considered, *but provides elaborately for the regulation and taxation of interstate transportation of the same character.* It imposes a tax, computed upon *mileage and weight* (Secs. 6 (e) and 8) in an effort to make that tax *fairly compensatory* of the character and extent of appellant's use of the roads.

In these and in its other provisions, it seemingly seeks to cure the defects of the earlier act in so far as interstate commerce is concerned, and to bring itself within the permissive purview of the Federal Constitution. It expressly requires appellant to follow a specified route on leaving a port of entry and his clearance certificate is valid for only the one specific trip. (Sec. 7.) No such limitation is imposed upon intrastate transportation of the same character by Chapter 56, under which intrastate transportation is free to roam the state at will over such highways, with limitless mileage and for such period of time as it

desires, nor is it required to call at a port of entry. Unconstitutional discrimination against appellant in his interstate commerce results. With this result, can it be assumed that the Legislature intended anything other than repeal?

The later act imposes only one tax, a mileage tax, *but in lieu thereof*, gives the owner of a vehicle the *option* of paying the fees required for regular license plates under the general registration and license law. (Sec. 8, Chapter 136.) This option expressly evidences an intention to retain these regular license plate fees in full force and effect. But this option contains no terms giving appellant the right to pay the tax for the "special permit" required under Chapter 56. This is significant, and clearly indicates that the right to collect these "special permit" taxes was not intended to be retained.

Because the later act lays but one tax, a mileage tax, the rule *"expressio unius est exclusio alterius"* would seem to limit the taxes which may lawfully be exacted from this appellant to the mileage tax laid in the later act, unless he exercises the option therein granted. In the event such option should be exercised, the "special permit" tax required by subdivision (d), Chapter 56, could not conceivably be exacted, *for in such event appellant's motor vehicle would be "licensed by the State of New Mexico," and by the express provisions of subdivision (d), subsection 1, Chapter 56, would be exempted from the payment of such "special permit" tax.* Herein, we submit, is shown the fallacy of the holding of the District Court [R. 37] that the "mileage tax shall supplement the flat fee." It is clearly to be seen that to carry the holding of the District Court to its logical conclusion, appellant, if he elected to pay the mileage tax, would also be required to

pay the "special permit" or flat fee, but if he elected to secure regular license plates, which election is expressly given him by section 8, Chapter 136, he would not be required to pay such "special permit" or "flat tax" fee. Such result would be manifestly contradictory, and leads to the conclusion that it was not the intention of the Legislature to require the payment of two taxes.

Freely admitting that repeals by implication are not favored, yet this rule gives way to the exception, that if the later act is on the same subject and is so broad in its terms and so clear and explicit in its words as to show it was intended to cover the whole subject, and, therefore, to displace the prior act their repeal is effected, and certainly to the extent of any repugnancy and conflict.

U. S. v. Lee Yen Tai, 185 U. S. 213, 221, 222;
Frost v. Wenie, 157 U. S. 46, 58;
James v. County Commissioners, 24 N. M. 509, 174 Pac. 1001.

Under the rules of construction above mentioned, the appellant contends, that in so far as Chapter 56, Laws of 1935, authorize the exaction of a tax from appellant as a condition precedent, or otherwise, to his use of the highways in his interstate commerce a repeal is effected, and such such exaction deprives appellant of his property without due process of law in violation of the Federal Constitution.

In addition, section 17 of Chapter 136 provides:

"All acts or parts of acts in conflict herewith are hereby repealed."

Chapter 56, subdivision (d), is in conflict with the provisions of Chapter 136 and hence by virtue of section 17, above quoted, is repealed.

POINT II.

Chapter 56 of the 1935 Sessions Laws of the State of New Mexico Is Unconstitutional and Void as Repugnant to Section 8 of Article I of the Constitution of the United States. (Specifications of Error Nos. I and III.)

A STATE MAY NOT LAY A TAX UPON THE PRIVILEGE OF ENGAGING IN INTERSTATE COMMERCE.

The above rule is well settled, and is accurately expressed in the case of *Cooney v. Mountain States Tel. & Tel. Co.*, 294 U. S. 384, where the court, at page 392, said:

> "But a state cannot tax interstate commerce, it cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it."

It is submitted that the instant cause is novel in this respect: That the motor vehicles, the transportation of which, for a specified purpose, *i. e.*, sale, is the *subject* of the tax levied by Chapter 56, are, in and of themselves goods, wares and merchandise, *the subject of interstate commerce*. None of the decisions of this court concerning motor vehicle taxation for use of highways, which have come to our attention, have involved a factual situation of this nature.

The tax imposed by Chapter 56 is clearly levied not for the use of the highways, but upon the business of appellant to which such use is incidental. In other words, if said motor vehicles are transported for any purpose other than sale, the collection of the tax is precluded by the wording of the statute. The tax, therefore, is *not* upon

the use, *but rather upon the purpose, i. e.,* sale, which is the business of this appellant.

> "Thus, the States cannot tax interstate commerce, either by laying a tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it. *Similarly, the States may not tax property in transit in interstate commerce.*"
>
> *Minn. v. Blasius,* 290 U. S. 1, at page 9.

See also:

Sprout v. South Bend, 277 U. S. 163;
Interstate Transit v. Lindsey, 283 U. S. 183;
West v. Kansas Natural Gas Co., 221 U. S. 229.

Requirements of Valid Motor Vehicle Tax for Use of Highways in Interstate Commerce.

Article I, section 8, of the Federal Constitution, grants to Congress the power to regulate commerce with foreign nations and among the several states. Familiar as we know the court to be with its language, we quote a portion as follows:

> "The Congress shall have power * * * to regulate commerce with foreign nations and among the several states * * *."

Under this section, the principle has long been recognized by judicial decisions of this Honorable Court that, subject to certain fundamental limitations, a state may

legislate on inspection laws, quarantine laws, and various other police regulations, local rather than of national character; also, where special facilities owned by the state are used, such as wharves, reasonable compensation may be exacted, even though interstate commerce be indirectly affected. In the case of *Hendricks v. Maryland*, 235 U. S. 610, this court recognized the right of a state, in the absence of national legislation, to exact compensation for the use of public highways, constituting as they do "special facilities" furnished by the state.

In the last cited case, as in the cases of inspection, quarantine, and taxing power in connection with the use of special facilities, such as wharves, the states within their power to act with respect to interstate commerce, are subject to certain restrictions and limitations, and such restrictions and limitations are as well defined as is the power itself.

In respect to legislation of the character which is here involved, such restrictions and limitations are:

First: The tax is valid only if compensatory, and therefore must necessarily be predicated upon the *use made, or to be made, of the public highways or upon the cost of the administration and policing thereof, occasioned by such use.*

Second: That, even though, when measured by the above rule, the tax be valid, *the same cannot be upheld if it constitutes a discrimination against interstate commerce.*

It is only by virtue of the fact of compliance with both of the above limitations, that a tax may be prevented from constituting a direct burden on interstate commerce. These limitations are clearly delineated by the following cases:

Hendrick v. Maryland, 235 U. S. 610;

Kane v. New Jersey, 242 U. S. 160;

Sprout v. South Bend, 277 U. S. 163;

Interstate Transit v. Lindsey, 283 U. S. 183;

Clark v. Poor, 274 U. S. 554;

Sproles v. Binford, 286 U. S. 374;

Michigan Pub. Utilities Com. v. Duke, 266 U. S. 570;

Buck v. Kuykendall, 267 U. S. 307;

Interstate Busses Corp. v. Holyoke St. Ry. Co., 273 U. S. 45;

Morris v. Duby, 274 U. S. 135;

Interstate Busses Corp. v. Blodgett, 276 U. S. 245;

Continental Baking Co. v. Woodring, 286 U. S. 352;

Hicklin v. Coney, 290 U. S. 169;

Aero Mayflower Transit Co. v. Georgia Pub. Serv. Com., 295 U. S. 285;

Prouty v. Coyne, 55 F. (2d) 289.

THE TAX IS NOT COMPENSATORY.

The tax exacted by Chapter 56 is a flat tax and substantial in amount. Section 8, Chapter 136, provides for the payment of a mileage tax against motor vehicles described in subsection (e) of section 6 of said Chapter 136, based upon gross weight. Where the gross weight of vehicle and cargo does not exceed fifteen thousand (15,000) pounds one and one-half (1½) cent per mile; where gross weight of vehicle and cargo exceeds fifteen thousand (15,000) pounds, but does not exceed twenty-five thousand (25,000) pounds, two (2) cents per mile; and where gross weight of vehicle and cargo exceeds twenty-five thousand (25,000) pounds, three (3) cents per mile.

Section 13 of said Chapter 136 provides as follows:

> "The term, 'Transportation of Property,' as used in this act, shall not only include the transportation of property in or on a motor vehicle, *but shall also be construed to include the driving or moving on the public highways of any motor vehicle either under its own power or by being pulled by another motor vehicle when said vehicle or vehicles are to be sold or offered for sale to or by any agent, dealer, purchaser or prospective purchaser.*"

Thus section 13 brings this appellant within subsection (e) of section 6 of said Chapter 136, and makes appellant subject to the payment of the mileage tax based upon the above mentioned gross weight.

Appellant purchases new and used motor vehicles of the pleasure type only; all have pneumatic tires, *and none weigh over five thousand (5,000) pounds* [R. 50]. Appellant travels over the highways of New Mexico a dis-

tance of 166 miles, consuming approximately seven hours [R. 44].

If it were construed that appellant is subject only to the tax required by subdivision (d) of Chapter 56, it will thus be seen that for the charge of $7.50 for each single vehicle or the vehicle pulling another vehicle, *appellant is required to pay approximately four and one-half (4½) cents per mile*, and where the charge of $5.00 is required for a vehicle pulled, *appellant is required to pay approximately three (3) cents per mile*, even though in both instances, *the motor vehicle does not exceed five thousand (5,000) pounds.*

Under the mileage tax requirements of section 8, Chapter 136, *a vehicle weighing twenty-five thousand (25,000) pounds would only be required to pay three (3) cents per mile.*

If, as the District Court holds, the provisions of both statutes are in harmony, and the one supplements, or is in addition to the other, then appellant will be required to pay an additional one and one-half (1½) cent per mile, making a total of six (6) cents per mile and four and one-half (4½) cents per mile respectively. *This lays upon lighter vehicles transported by appellant a far greater tax per mile than upon vehicles of much greater weight.*

For example, a huge truck, with load, weighing in exces of twenty-five thousand (25,000) pounds, is required to pay only three (3¢) cents for each mile traveled. If it pulls a trailer, weighing in excess of twenty-five thousand (25,000) pounds, as we construe the law, the trailer would also pay three (3¢) per mile for each mile traveled. It will thus be seen that a pleasure type vehicle, *weighing, at*

the most, only one-fifth as much, and traveling, as do appellant's vehicles, directly through the state, a distance of one hundred and sixty-six (166) miles, is required to pay six (6¢) per mile if driven singly, and if it be in tow of another vehicle, four and one-half (4½¢) per mile. The only basis for the additional charge is that in the latter instance, *the vehicles are being moved for the purpose of sale, which is the business in which this appellant is engaged.* Certainly it will not be contended that a vehicle of the pleasure type, weighing not in excess of five thousand (5,000) pounds, will cause twice as much damage to the highways as a truck weighing in excess of twenty-five thousand (25,000) pounds.

In *Sprout v. South Bend,* 277 U. S. 163, at page 170, it was said:

> *"A flat tax,* substantial in amount and the same for busses plying the streets continuously in local service and for busses making, as do many interstate busses, *only a single trip daily, could hardly have been designed as a measure of the cost or value of the use of the highways."*

Like the tax in *Sprout v. South Bend, supra,* the exaction under subdivision (d) of Chapter 56, is a flat tax, substantial in amount, and it may be said thereof, as was said of the tax in that case, that it "could hardly have been designed as a measure of the cost or value of the use of the highways."

In *Interstate Transit Co. v. Lindsey,* 283 U. S. 183, the court had under consideration a statute of Tennessee imposing upon interstate motor bus transportation a privi-

lege tax graduated according to carrying capacity. The court, at page 185, declared:

"While a state may not lay a tax on the privilege of engaging in interstate commerce (Sprout v. South Bend, 277 U. S. 163, 72 L. ed. 833, 62 A. L. R. 45, 48 S. Ct. 502), it may impose even upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, *which is a fair contribution to the cost of constructing and maintaining them and of regulating the traffic thereon.* (Kane v. New Jersey, 242 U. S. 160, 168, 169, 61 L. ed. 222, 227, 228, 37 S. Ct. 30; Clark v. Poor, 274 U. S. 554, 71 L. ed. 1119, 47 S. Ct. 702; Sprout v. South Bend, *supra* (277 U. S. 169, 170, 72 L. ed. 836, 837, 62 A. L. R. 45, 46, 48 S. Ct. 502).) As such a charge is a direct burden on interstate commerce, *the tax cannot be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic. This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use* (Interstate Busses Corp. v. Blodgett, 276 U. S. 245, 72 L. ed. 551, 48 S. Ct. 230), or by the express allocation of the proceeds of the tax to highway purposes, as in Clark v. Poor, 274 U. S. 554, 71 L. ed. 1199, 47 S. Ct. 702, *supra,* or otherwise. Where it is shown that the tax is so imposed, it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory. Hendrick v. Maryland, 235 U. S. 610, 612, 59 L. ed. 385, 35 S. Ct. 140; Interstate Busses Corp. v. Blodgett, 276 U. S. 245, 250-252, 72 L. ed. 551, 554-555, 48 S. Ct. 230. Compare Interstate Busses Corp. v. Holyoke St. R. Co., 273 U. S. 45, 51, 71 L. ed. 530,

534, 7 S. Ct. 298. *But the mere fact that the tax falls upon one who uses the highway is not enough to give it presumptive validity.*"

Further, at page 190:

"It is suggested that a tax on busses graduated according to carrying capacity is common and is a reasonable measure of compensation for the use of the highways. It is true that such a measure is often applied in taxing motor vehicles engaged in intrastate commerce. Being free to levy occupation taxes, states may tax the privilege of doing an intrastate bus business without regard to whether the charge imposed represents merely a fair compensation for the use of their highways. Compare Gundling v. Chicago, 177 U. S. 183, 189, 44 L. ed. 725, 729, 20 S. Ct. 633. But since a state may demand of one carrying on an interstate bus business only fair compensation for what it gives, such imposition, although termed a tax, *cannot be tested by standards which generally determine the validity of taxes.* Being valid only if compensatory, the charge *must be necessarily predicated upon the use made, or to be made, of the highways of the state.* Clark v. Poor, 274 U. S. 554, 71 L. ed. 1199, 47 S. Ct. 702, *supra.* In the present act the amount of the tax is not dependent upon such use. *It does not rise with an increase in mileage traveled,* or even with the number of passengers actually carried on the highways of the state. *Nor is it related to the degree of wear and tear incident to the use of motor vehicles of different sizes and weights,* except in so far as this is indirectly affected by carrying capacity. The tax is proportioned solely to the earning capacity of the vehicle. Accordingly, *there is here no sufficient relation between the measure employed and the extent*

or manner of use, to justify holding that the tax was a charge made merely as compensation for the use of the highways by interstate busses. We need not therefore consider whether the tax exacted from this appellant is unreasonably large or unjustly discriminatory."

The holding in the *Interstate Transit Co. v. Lindsey* case is applicable to the case at bar. The statute in that case held invalid made a small gesture toward measurement of the tax by seating capacity. On the other hand subdivision (d), Chapter 56, shows no attempt whatsoever to apportion the tax to the use made of the highways. Not only, as was said of the tax in the *Interstate Transit Co.* case, *supra*, is the tax unrelated to mileage traveled, degree of wear and tear incident to use, size or weight of vehicle, but such tax is not predicated upon any standard whatsoever, and reflects only the arbitrary decision of the Legislature.

See also:

Prouty v. Coyne, 55 Fed. (2d) 289.

CONFLICT IN REASONING OF DISTRICT COURT ON THIS POINT.

The trial court, in attempting to justify the "flat tax" feature of subdivision (d), Chapter 56, states [R. 35-36]:

"Certainly the exaction of a flat charge for such transportation, instead of graduating it upon a mileage basis which conceivably could entail substantial administrative difficulty and expense, cannot be said to constitute discrimination."

We cannot reconcile such reasoning with the fact that, as heretofore shown, there *actually is in existence* a tax graduated upon a weight-mileage basis, and particularly in view of the court's holding that,

> "it indicates persuasively an intent in the later instance to require both; *in other words that the mileage tax shall supplement the flat fee.*" [R. 37.]

In other words, after first attempting to justify the levy of a flat tax, by referring to difficulties of administration of a graduated tax based upon mileage, the court then proceeds to rule that such graduated mileage tax was intended to be in addition to, and supplemental of such flat tax. This reasoning would seem to defeat itself.

The administrative difficulties of charging appellant on a mileage basis would be practically nil, since only one trip is made through the state by each vehicle, for a known distance.

As heretofore shown, only 42.3 cents of each dollar exacted from appellant under subdivision (d) of Chapter 56, is allocated to the administration, regulation, construction or maintenance of public state highways. The rule seems well established by decisions of this court that the tax must be expended for the purpose of regulating, maintaining and constructing the highways subject to the use. Thus, in *Aero Mayflower Transit Co. v. Georgia Pub. Serv. Com.*, 295 U. S. 285, 289, the court said:

> "It goes into a fund for the upkeep of highways which cariers must use in the doing of their business; * * *"

A research of the point now being discussed discloses no decision sustaining such a tax where the proceeds thereof were not paid into a fund to be expended for the

administration, regulation, maintenance and construction of the highways used. A lone remark is found in the case of *Clark v. Poor*, 274 U. S. 554, 557, where it was said:

> "It is said that all of the tax is not used for maintenance and repair of the highways; that some of it is used for defraying the expenses of the commission in the administration or enforcement of the act; and some for other purposes. This, if true, is immaterial. Since the tax is assessed for a proper purpose, and is not objectionable in amount, the use to which the proceeds are put is not a matter which concerns the plaintiffs."

However, in the case of *Interstate Transit Co. v. Lindsey, supra*, 283 U. S. 183, 186, the court says:

> "This may be indicated by the nature of the imposition, such as a mileage tax, directly proportioned to the use (Interstate Busses Corp. v. Blodgett, 276 U. S. 245, 72 L. ed. 551, 48 S. Ct. 230), *or by the express allocation of the proceeds of the tax to highway purposes, as in Clark v. Poor, 274 U. S. 554, 71 L. ed. 1199, 47 S. Ct. 702, supra, or otherwise.*"

A footnote following the last quoted statement is contained in 75 L. ed. 967, as follows:

> "The Ohio statute there involved (Clark v. Poor) declared that the taxes were laid and were to be used only for, the maintenance and repair of highways and for the regulation of motor traffic. Ohio Gen. Code, Secs. 614-94, 614-96. The 'other purposes,' referred to in the opinion, 274 U. S. at p. 557, 71 L. ed. 1200, 47 S. Ct. 702, were the general expenses of the state motor vehicle department as distinguished from expenditures specifically upon the highways."

POINT III.

Chapter 56 of the 1935 Session Laws of the State of New Mexico Is Unconstitutional and Void as Repugnant to Section I of the Fourteenth Amendment to the Constitution of the United States, in That It Denies to Appellant the Equal Protection of the Laws. (Specifications of Error Nos. I and IV.)

CLASSIFICATION FOR PURPOSES OF TAXATION MUST BE REASONABLE.

By a lengthy line of decisions of this Honorable Court, the rule has been established, that the equal protection of the laws guaranteed by the Fourteenth Amendment means subjection to equal laws applying alike to all in the same situation, and that,

> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, *such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed;* and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, canot be justified by calling it classification."
>
> *Southern Ry. Co. v. Greene*, 216 U. S. 400, 417.

On the same point, we refer to:

Bowman v. Lewis, 101 U. S. 22;

Gulf, Colorado & Santa Fe Ry. Co. v. Ellis, 165 U. S. 150;

Connolly v. Union Sewer Pipe Co., 184 U. S. 540;

Power Mfg. Co. v. Saunders, 274 U. S. 490.

The police power of the state is subordinate to, and must be exercised in such manner as not to violate the equal protection clause.

Atchison, Topeka & Santa Fe Ry. Co. v. Vosburg, 238 U. S. 56.

The exercise, by the state, of the power of taxation, is also subject to the inhibition of the equal protection clause.

County of San Mateo v. Southern Pac. Ry. Co. (The Railroad Tax Cases), 13 Fed. 722.

Analysis of Dimensions of Classification Under Chapter 56.

The classification created by Chapter 56 is defined by two limitations. The first is expressed in the words of the statute as follows: *"Any motor vehicle on its own wheels."* The second limitation or dimension of the classification is as follows: *"For the purpose of selling or offering the same for sale."*

It cannot be denied that these two characteristics are the only ones necessary to render the vehicle subject to the tax, and that the latter characteristic, *"for the purpose of selling or offering the same for sale,"* is the dominant one. For it is the latter characteristic which subjects the motor vehicles owned by appellant to the payment of the tax, distinguishing such automobiles from all other types of motor transportation moving upon the highways of the State of New Mexico.

THE CLASSIFICATION DOES NOT REGULATE GROUP MOVEMENTS OF AUTOMOBILES.

A proper tax classification of vehicles moving in integrated groups or fleets might be proper, but the statute in question does not accomplish such a classification. The tax is levied alike upon vehicles moving in fleets *and upon vehicles moving singly*, so long as the same are goods seeking their market; this is accomplished, despite the fact that a vehicle moving singly over the highways, though it may be for the purpose of sale, cannot conceivably cause greater wear on the highways or policing expense than the same vehicle using the highways of the state for any other purpose either commercial or otherwise. Twenty to twenty-five per cent of the motor vehicles moved through the State of New Mexico by appellant are driven singly; that is, not hooked to any other car [R. 51].

As pointed out by the Honorable Franklin E. Kennamer, District Judge, in the dissenting opinion written in this cause after trial in the District Court [R. 39], an examination of the taxing statute discloses that the tandem practice of transportation is encouraged rather than penalized in proportion to increase in expense and hazard. Single vehicles, whether moving in conjunction with larger groups or not, are taxed $7.50 per vehicle. Vehicles in tandem (which the state contends are responsible for the most danger and damage on the highways) pay at the rate of $7.50 for the lead car and $5.00 for the towed car, thus offering a discount of $2.50 on the gross tax levied on two automobiles. This, rather than regulating and decreasing the alleged hazards complained of, actually offers a premium for the complication of the traffic problems of the state.

Rather than regulating group or fleet movement of automobiles, which movements might conceivably form a proper classification for tax purposes, the provisions of Chapter 56 contain no reference thereto (excepting in so far as the reference to a towed vehicle may be so considered). Under the express provisions of such statute, a private individual transporting an automobile upon the highways, for the purpose of selling the same, either in or out of the State of New Mexico, would be required to pay the tax.

The Statute Is Not a Police or Regulatory Measure.

It may well be said of the statute under consideration, in the words of the court in *Frost v. Railroad Commission,* 271 U. S. 583, 591:

> "It is very clear that the act as thus applied, is in no real sense a regulation of the use of the public highways. *It is a regulation of the business of those who are engaged in using them.*"

If the object of the statute were to promote the public safety in relation to traffic on the highways, it would be reasonable to suppose that it would provide restrictions as to the number of vehicles permitted to proceed in caravan or group formation, the manner in which towed automobiles must be connected, the speeds at which such traffic might travel, requirements as to operators thereof, and similar provisions, possibly going as far as to require long processions to proceed under convoy or escort. The statute attempts none of these regulations, and is neither in form nor in substance, a regulatory enactment under the police power of the state. It must properly be treated

simply as a revenue raising measure. We have heretofore, in Point II of the argument, *supra*, given our contentions that the tax is not reasonable, or compensatory of the use of the highways.

CLASSIFICATION CREATED IS UNRELATED TO ALLEGED OBJECTS OF THE STATUTE.

Considering the dominant characteristic of the classification, *"for the purpose of selling or offering the same for sale,"* it must be apparent that the classification is unreasonable, arbitrary and capricious, and bears no substantial relation to the alleged purposes of the statute. The tax is levied upon the vehicles *only in the event they are being transported for sale, and hence, only when they are merchandise the actual subjects of interstate commerce or goods seeking their market, and in transit for such purpose.* The state may not tax property in transit in interstate comerce.

Minn. v. Blasius, 290 U. S. 1.

If the purpose of the transportation is not to sell the vehicle, then under the express provisions of the statute, the tax cannot be exacted. For example, any person could transport upon the highways of the state, on their own wheels or in tow of others, any number of automobiles, singly or in groups, for the purpose of using them in a taxicab business, an auto-rental business, a delivery business, *or for any other purpose, commercial or non-commercial, except the purpose of sale,* and such person would not be required to pay the tax. This is not only unreasonable, but it is discriminatory.

Such *"purpose of sale"* may have already been accomplished before the vehicle entered the State of New Mexi-

co, since title may pass without possession; or, as would more usually be the case, such *"purpose"* may not be accomplished until the automobile finally comes to rest either in the State of New Mexico or in some other state. Such *"purpose"* would seldom, if ever, be accomplished during the short period of actual use of the highways. How then, can such "purpose" of intended sale, *existing only in the mind of the owner of the automobile,* bearing no relation to the use of the highways, to the damage or deterioration thereof, the hazards or dangers thereon, or the regulation and policing thereof, form the basis of a valid classification for the purpose of taxation? Such classification is arbitrary, unreasonable, capricious and discriminatory. In the exercise of the police power of the state, the legislature is not concerned with the purposes for which automobiles are transported (so the same be legitimate) *but only with the manner in which the highway is used.*

SUBDIVISION (D) CHAPTER 56 UNLAWFULLY DISCRIMINATES AGAINST INTERSTATE COMMERCE.

"Of course, the state may not discriminate against interstate commerce."

Morris v. Duby, 274 U. S. 135, 143.

SUBSECTION 1 OF SUBDIVISION (d) EXEMPTS MOTOR VEHICLES LICENSED BY STATE OF NEW MEXICO.

This in itself constitutes an unlawful discrimination against the transporters of motor vehicles licensed by and originating in states other than New Mexico. Further, this constitutes a real discrimination against interstate commerce and in favor of intrastate commerce, for it is

a commonly known fact, of which the court can take judicial notice, that automobiles licensed in New Mexico, and transported upon the highways thereof for the purpose of sale, are in the great majority of instances the subjects of intrastate, as distinguished from interstate commerce, whereas automobiles bearing foreign licenses, transported upon the highways of New Mexico for the purpose of sale, are necessarily the subjects of interstate commerce. Motor vehicles transported by appellant over the highways of the State of New Mexico bear registration plates of states in which they are purchased, but none bear New Mexico license plates [R. 51].

It is well established that a state by its laws may not discriminate in favor of intrastate as against interstate commerce, nor in favor of products having their origin in such state and against those originating in other states. The situation is analogous to that presented in *Bethlehem Motors Corp. v. Flynt*, 256 U. S. 421, where the court declared:

> "The condition can be satisfied by a resident manufacturer, his factory and its products in the first instance being within the state; it cannot be satisfied by a nonresident manufacturer, his factory necessarily being in another state, some of its products only at a given time being within the state. Therefore, there is a real discrimination, and are offenses against the 14th Amendment, * * *."

In *Aero Mayflower Transit Co. v. Georgia Public Service Commission, supra*, it was said of the fee charged:

> "It is exacted *without hostility to foreign or interstate transactions*, being imposed also upon domestic vehicles operated in like conditions."

The tax is, in effect, a discriminating tax imposed by a state operating to the disadvantage of the products of another state, such as was denounced in the case of *Walling v. Michigan,* 116 U. S. 446.

On the same point:

Voight v. Wright, 141 U. S. 62;

Sonneborn Bros. v. Keeling, 262 U. S. 506;

Welton v. Missouri, 91 U. S. 275;

I. M. Darnell & Son Co. v. Memphis, 208 U. S. 113;

Baldwin v. Selig, Inc., 294 U. S. 511;

Webber v. Virginia, 103 U. S. 344.

SUBSECTION 2 OF SUBDIVISION (d), CHAPTER 56, EXEMPTS MOTOR VEHICLES OWNED BY AN AUTOMOBILE DEALER, DULY LICENSED BY THE STATE OF NEW MEXICO, AND OPERATED UNDER A DEALER'S LICENSE.

The District Court held on this contention [R. 36] that the effect of the last mentioned provision was not to give dealers licensed in New Mexico the right to transport automobiles over the highways for the purpose of sale, without payment of the special permit fee under Chapter 56, but that they are permitted to use dealer's plates for demonstration purposes only. Even if this reasoning were valid, it is to be noted that demonstration of automobiles is very closely connected to the purpose of sale, which usually follows from such demonstration. However, we are unable to follow the reasoning of the court in this respect, which apparently adopted the views of appellee ex-

pressed in the return to the rule to show cause [R. 26]. Even in such return, it is stated:

> "that said sub-paragraph 2 only saves to said automobile dealers licensed by New Mexico the rights which they had by virtue of Sections 11-319 and 11-330 of the Code of New Mexico, of operating motor vehicles for *purposes of demonstration and sale* only, prior to the enactment of House Bill No. 71, and does not confer upon them any new or additional rights." [R. 26.]

Since Chapter 56 refers, in subdivision (d) to automobiles transported for the sole purpose of sale, it is hard to conceive why such local automobile dealers were mentioned in subsection 2, unless it were the intent to exempt them from payment of the tax provided by said subdivision (d). There would be absolutely no point in saving to them a right "to demonstrate," in a statute, such as Chapter 56, which taxes only transportation "for the purpose of selling or offering for sale," unless the purpose were to exempt them from payment of the tax therein imposed.

There is no provision in Chapter 56, which, even in the absence of sub-section 2, subdivision (d), would require a resident dealer of New Mexico to obtain a special permit for the purpose of demonstrating automobiles, which he could theretofore demonstrate without such permit. In other words, if the Legislature had not intended to give the automobile dealer licensed by the State of New Mexico an exemption from payment of the tax levied against appellant, it would have been wholly unnecessary to place subsection 2 of subdivision (d) into the statute.

Carrying the reasoning further: If *subsection 1* of subdivision (d) were removed from the statute, then, even though an automobile bore a New Mexico license, the person transporting it for the purpose of sale would be required to pay the flat fee. Plainly, then, subsection 1 was inserted for the purpose of giving an exemption from the payment of the tax.

By exactly the same reasoning, it is plain to be seen that *subsection 2* was inserted to give automobile dealers, licensed by the State of New Mexico and operating under dealers' licenses, a further and additional exemption, to-wit: the transportation of motor vehicles for the purpose of sale, without securing the special permit and paying the charge therefor, which is required of appellant for like privileges. The exemption could not have been expressed in clearer language, and we submit that the District Court erred in refusing to give such provision the construction contended for by appellant, which would have resulted in declaring the statute invalid as repugnant to the Fourteenth Amendment to the Federal Constitution.

We earnestly contend that by a correct construction of subsection 2 of subdivision (d) of Chapter 56, the New Mexico dealer, under his license and dealers' plates, would be permitted to transport automobiles into, across and out of the State of New Mexico for the purpose of sale, and to carry them both in interstate and intrastate commerce, without payment of the tax required of appellant, thus denying to appellant the equal protection of the laws.

CONTEMPORANEOUS CONSTRUCTION OF THE STATUTE.

While it does not appear in the record, we do not believe appellee will deny that, after the effective date of Chapter 56 (February 21st, 1935), no attempt was made by appellee to collect the tax required by subdivision (d) of Chapter 56 from local dealers. The contemporaneous construction placed upon said statute by appellee, the executive officer in charge of enforcing it, was that it did not apply to local dealers engaged in business in New Mexico.

> "It is a familiar rule of statutory construction that great weight is properly to be given to the construction consistently given to a statute by the executive department charged with its administration (citing cases); and such construction is not to be overturned unless clearly wrong, or unless a different construction is plainly required." *United States v. Jackson*, 280 U. S. 183, 193.
>
> "The contemporaneous construction placed upon a statute by the officers or departments charged with the duty of executing it is entitled to more or less weight, especially if such construction has been made by the highest officers in the executive department of the government, * * *."
>
> 59 *Corpus Juris*, pages 1025-27.

From the foregoing, we believe it to be established that the District Court, by the entry of its decree, erred in denying to the plaintiff the equal protection of the laws to him guaranteed in the Fourteenth Amendment to the United States Constitution.

POINT IV.

The District Court Erred in Overruling Appellant's Objections to Admission in Evidence of Facts Set Out in Paragraphs XXI, XXII, XXIII, XXIV, XXV, XXVI, XXVII, XXIX, XXX, XXXI, XXXII, XXXIV and XXXVII of the Stipulation of Facts, and in Thereafter Adopting Said Stipulated Facts Objected to, as Facts of Its Own Finding. (Specifications of Error Nos. I and VI.)

Paragraph XXI of the stipulated facts pertaining to the status of the used car market of Texas and other states as compared with that in California, is not material to the issues of this cause. Plaintiff's profit cannot affect his constitutional rights.

The distance from the point of purchase to place of resale, specified in paragraph XXII, is likewise immaterial.

The facts in paragraph XXIII and XXIV, relating to condition of appellant's automobiles which are transported, are objectionable, in view of the fact that Chapter 56 does not constitute a police or regulatory statute.

The freight rates for transporting automobiles could not affect the issues of the case. A comparison of the cost to appellant of transporting his automobiles in his chosen manner, all as set out in paragraph XXV is likewise valueless. No issue was raised as to the legality of the methods used by appellant to transport his auto-

mobiles, and no law compels him to use railroad freight transportation far exceeding the cost of transporting the motor vehicles on their own wheels.

Paragraphs XXVI, XXVIII, XXIX, XXX, XXXI, XXXII and XXXIV of the stipulated facts deal with the amount of fees collected by the state, the number of automobiles transported by plaintiff, the total collections of the ports of entry, the expense of operating the same, the area, population and assessed valuation of the property of the State of New Mexico, the appropriation for State Police, the cost of the highways and the revenues of the highway department.

It is appellant's contention that all of these matters, as well as all of the other stipulated facts objected and excepted to, were and are irrelevant and immaterial, improperly admitted in evidence, and made the findings of the District Court, for the following reasons:

1. The statute does not attempt to make a tax compensatory for the use of the highways, for the reasons previously given.

2. The statute is in no sense a police or regulatory measure.

3. The said facts have no bearing upon the question of the repeal of Chapter 56 of the 1935 Session Laws by Chapter 136 of the same Session Laws.

4. The said facts have no bearing on the constitutionality of the statute in question.

POINT V.

The District Court Erred in Making Its Findings of Fact Numbers 2, 3, 4 and 5 Over Appellant's Written Objections and Exceptions Thereto. (Specifications of Error Nos. I and VII.)

The findings here objected to [R. 31], are not founded upon any competent and sufficient evidence adduced at the trial of this cause. They are further objectionable for the reason, heretofore adverted to, that Chapter 56 does not purport to be, and is not in fact, a police measure to regulate the use of the public highways of the state or to promote public safety with relation to traffic thereon.

Finding 2 [R. 31], states that the manner in which plaintiff causes his automobiles to be transported is extraordinary and unusual; that it increases the hazards incurred by the general public and in that manner affects the safety and public welfare, and increases the burden of policing the highways.

The evidence adduced failed to show anything extraordinary, unusual or particularly hazardous in the manner of transporting plaintiff's automobiles. The witness Gonzales, a state police officer, testified that he had never arrested any of the drivers of appellant's caravans, and that in all of the caravans going through the state, he remembered making only two arrests [R. 52-53], although he had been stationed at Las Cruces, where the automobiles enter the state, for about fourteen months. He further testified [R. 52] that possibly twenty-five per

cent of "our time" is consumed in handling and regulating this type (motor caravan) traffic. Yet the very acts which he states consumed the said time are the acts which are required to be performed by the officials at the ports of entry under Sec. 4, Chapter 136.

Nor was there any testimony which showed that the operations of appellant cause any peculiar wear and tear to the highways, as found by Finding No. 3, different from that caused by other pleasure or commercial type automobile traffic. The complaints which this witness makes in his testimony concerning appellant's operations refer to various matters, *none of which are regulated, controlled, or mentioned by Chapter 56.* The said Finding No. 3 further ignores the fact that a large percentage of plaintiff's automobiles are transported over the public highways of the State of New Mexico singly, and without any car being towed thereby [R. 51]. Said finding is further immaterial for the reason, heretofore argued, that the tax laid by Chapter 56 is not based upon compensation for the use of the public highways.

Finding No. 4 is wholly immaterial under the issues joined, since the profit made by appellant cannot affect the constitutionality of Chapter 56, nor the question of its repeal by Chapter 136. Nor is there any evidence in the record to support such finding.

POINT VI.

The District Court Erred in Entering Its Said Decree Upon the Insufficient Findings of Fact Made by It in This Cause.

There are no findings upon which the judgment and decree of the trial court holding Chapter 56 constitutional, can be sustained. Nor are the findings in the case sufficient upon the question of the repeal of Chapter 56 by Chapter 136, to support a decree based upon the fact that such repeal was not effected.

Further, the findings upon which the judgment and decree is based are wholly immaterial, for the reasons heretofore given.

Wherefore, it is respectfully submitted that the decree of the District Court for the District of New Mexico should be reversed and appellant be granted the relief prayed for in his bill of complaint.

Respectfully submitted,

RALPH K. PIERSON,
SAMUEL P. BLOCK,
Compton, Calif.;

GEORGE E. REMLEY,
HARRY S. BOWMAN,
Santa Fe, N. M.,

Solicitors for Appellant.

APPENDIX.

EXHIBIT NO. I.

CHAPTER 56.

AN ACT TO AMEND CHAPTER 139 OF THE SESSION LAWS OF 1933 RELATING TO REGISTRATION FEES FOR MOTOR VEHICLES.

House Bill No. 71; Approved February 21, 1935.

Be It Enacted by the Legislature of the State of New Mexico:

Section 1. That Chapter 139 of the Session Laws of 1933, be and the same is hereby amended to read as follows:

"11-321. Registration by non-residents.

"(d) No person, firm or corporation shall use the highways of the State of New Mexico for the transportation of any motor vehicle on its own wheels for the purpose of selling or offering the same for sale to or by any agent, dealer, purchaser or prospective purchaser whether such agent, dealer, purchaser or prospective purchaser be located within or without this state, unless such motor vehicle either:

1. Is licensed by the State of New Mexico; or

2. Is owned by an automobile dealer, duly licensed by the State of New Mexico and is operated under a dealer's license duly issued to such dealer; or

3. A special permit for the use of the highways of this state for the transportation of such vehicle, in the manner in which the same is being transported, has first

been obtained and the fee therefor has been paid as hereinafter specified.

Special permits for the use of said highways in the transportation of such vehicles shall be issued by the Commissioner of revenue of the State of New Mexico upon application on such form as said Commissioner may prescribe and upon payment of a fee of $7.50 for each such vehicle transported by use of its own power and a fee of $5.00 for each such vehicle towed or drawn by another vehicle and not transported in whole or in part by the use of its own power. All permits so issued shall be evidenced by certificate, issued by said Commissioner, which shall show upon the face thereof the registration number assigned to each such vehicle, the name and address of the owner thereof, the manner of transportation thereby authorized and a description of the vehicle so registered including the engine number thereof. Such certificate shall be carried at all times by the person in charge of such vehicle or vehicles. A suitable tag or placard shall be issued by the Commissioner with such certificate and shall be at all times displayed on each such vehicle whether the same is being so transported singly or in a caravan. No such permit, certificate, tag or placard shall be used upon or in connection with the transportation of any vehicle other than the one for which the same is issued."

Section 2. That it is necessary for the preservation of the public peace, health and safety of the inhabitants of the State of New Mexico that this Act shall become effective at the earliest possible time, and therefore an emergency is hereby declared to exist, and this Act shall take effect and be in full force and effect from and after its passage and approval.

EXHIBIT NO. II.

CHAPTER 136.

AN ACT TO CREATE PORTS OF ENTRY TO AID IN THE REGULATION OF THE USE OF THE PUBLIC HIGHWAYS OF THIS STATE BY MOTOR VEHICLES, AND TO AID IN THE COLLECTION OF TAXES AND THE ENFORCEMENT OF STATE AND FEDERAL POLICE AND HEALTH LAWS; CREATING A PORT OF ENTRY BOARD; DEFINING THE POWERS AND DUTIES OF SAID PORT OF ENTRY BOARD AND THE RIGHTS AND DUTIES OF OWNERS AND OPERATORS OF MOTOR VEHICLES; IMPOSING MILEAGE TAXES; PROVIDING PENALTIES FOR THE VIOLATION HEREOF, AND REPEALING ALL ACTS AND PARTS OF ACTS IN CONFLICT HEREWITH.

Senate Committee Substitute for Senate Bill No. 78; Approved February 28, 1935.

Be It Enacted by the Legislature of the State of New Mexico:

Section 1. In order to facilitate the enforcement of the laws of this State concerning "motor vehicles", "common motor carriers of property", "common motor carriers of passengers", "contract motor carriers of property", and "contract motor carriers of passengers", upon the "public highways" of this State, as each of said terms is defined by Chapter 154, New Mexico Session Laws of 1933, and to promote the safety and welfare of the public, the preservation and maintenance of the public highways, and the integrity of the regulation of motor carriers, and to more efficiently enforce the payment of registration fees, licenses, mileage taxes, and other charges imposed by law upon motor carriers of passengers for hire and for the transportation of property, and to aid in the collection of other

taxes and the enforcement of other laws, it is hereby declared necessary to provide for the establishment of registration stations or ports of entry into the State of New Mexico upon certain main highways entering the state, through which every motor carrier of passengers for hire or for the transportation of property shall enter the state, register, be inspected, and secure permission and authority to proceed into or across the State upon its public highways.

Section 3. The Port of Entry Board shall designate a sufficient number of main highways entering this State to reasonably meet the needs and requirements of persons operating motor vehicles for the transportation of passengers for hire and for the transportation of property who enter this State from points beyond its boundaries, and shall establish on each of said designated highways a registration office or port of entry where inspection and registration service shall be maintained. The Port of Entry Board is hereby authorized and empowered to appoint such deputies, agents and employees as it deems necessary properly to conduct and manage the affairs of such registration offices and to give service at such registration offices and ports of entry reasonably necessary to meet the needs and requirements of all persons required to register and receive inspection thereat.

The Commissioner of Revenue may in his discretion deputise persons in charge of or employed at ports of entry to act as his agents in the collection of all fees and taxes required by law to be collected by the Bureau of Revenue, and such persons in charge of or employed at ports of entry shall, while engaged in the performance of their duties in enforcing this act and collecting the fees,

licenses and taxes required to be collected by the terms of this act, be considered and held to be the deputies and agents of the departments or official charged with the collection of the same.

Section 4. Every motor carrier who shall transport into this state any property or who shall transport into this state any passengers for hire, by means of the public highways of this State must enter the State on a highway designated as heretofore provided, and shall without delay stop at the registration office or port of entry established on such highway and register, and submit to inspection. The driver of the motor vehicle shall immediately make out and deliver to the inspector at such port of entry a card showing the name of the owner of the vehicle, the name of the operator, or driver, the name of the forwarding or other company in whose service said vehicle is licensed, the license number, the state in which said vehicle has been granted a common or contract motor carrier permit, if any, and number of such permit, the motor number, and the serial number of the vehicle, and a description of such vehicle, whether automobile, truck, trailer, semi-trailer, tractor, motor bus or other type of motor-driven vehicle, the point of origin of the shipment, the ultimate destination of the shipment, the gross weight of vehicle and cargo, and the factory list capacity or the actual capacity if rebuilt, the number of taxable miles to be traveled within the state and the nature, amount and coverage of all public liability or other insurance carried upon said vehicle, and upon the cargo thereon. The driver of said vehicle shall likewise declare upon said registration card, the name and number of the highway or highways which he intends to use within the State and the place where he intends to leave the State. Said card shall

be signed by the operator or driver and filed with the person in charge of said registration station. The driver or operator of said vehicle shall likewise deposit with the person in charge of said registration station or port of entry a full, true and correct copy of his manifest, which shall show the precise nature and character of the cargo and the weight thereof, and shall be certified as a true and correct copy of the original manifest by the issuer thereof.

The person in charge of such registration station or port of entry shall verify the information contained upon said card and manifest, and shall check the license, permit, motor and serial numbers, weight and description of the vehicle. Such person shall likewise inspect said vehicle and ascertain whether the same is in safe and roadworthy condition, properly equipped with all lights, brakes and other appliances required by any statute of this state, in such condition as to be safe for operation upon the public highways of this State.

The person in charge of said port of entry or registration station shall likewise satisfy himself as to the nature and character of the cargo, of the weight thereof, and is authorized to do any and all things necessary to obtain full and complete information in respect thereto, and if in doubt as to the declared weight may order the same weighed before issuing any clearance certificate for such motor vehicle.

The person in charge of said port of entry or registration station shall further inspect the contents of such vehicle to determine whether or not all taxes on gasoline and motor fuel, and excise taxes on alcoholic liquors, and all taxes on any other property have been fully paid.

The person in charge of the said port of entry or registration station shall further inspect such vehicle and its contents to determine whether or not all laws and all rules and regulations of the Departments of this State with respect to public safety, health, welfare and comfort have been fully complied with.

The person in charge of such port of entry or registration station shall further require from the driver or drivers of such vehicles a showing, in such form and in accordance with such rule as may be established by the Port of Entry Board, that the driving of such vehicles within this state shall not be in violation of the provisions of Chapter 61 of the Session Laws of 1933, relating to the hours of service of drivers and chauffeurs.

Section 5. No motor vehicle transporting passengers for hire or transporting property shall be allowed to proceed from a port of entry into the State of New Mexico upon the highways thereof until and unless it has been duly registered and inspected at such point of entry or registration office and a clearance certificate issued therefor.

Section 6. After such registration and inspection clearance certificates or special permits shall be issued for . . .

(e) Motor vehicles not registered or licensed in this state and which are transporting property not for hire, when

(1) All taxes required by the laws of this state upon the contents of such vehicles have been paid and all other laws, and rules and regulations of departments of this state applicable to such contents have been complied with; and

(2) Such motor vehicles have been found by the inspector in charge of such port of entry or registration station to be in a safe and roadworthy condition, duly and properly equipped with all lights, brakes and other equipment and appliances required by the laws of this state, in the interest of the safety and convenience of the public, and

(3) When the mileage tax in Section 8 set forth or the license fee in lieu thereof as in said section provided shall have been fully paid.

Section 7. Clearance certificates shall be issued to all motor vehicles described under subsections (a), (b), and (c) of Section 6; special permits accompanied by clearance certificates shall be issued to motor vehicles described under subsection (d), of Section 6; and a permit accompanied by a clearance certificate shall be issued to all motor vehicles described under subsection (e) of Section 6.

The certificates of clearance and special permits shall show such data as the Port of Entry Board shall prescribe, but in any event the same shall include the serial and motor number of the vehicle together with the license or tag number of such vehicle, the date such certificate is issued, the port of entry at which such certificate issued and destination to which issued and the amount, if any, paid at the time of the issuance of such certificate or special permit.

Such certificates of clearance and special permits shall be in the form of stickers in such size and form as may be prescribed by the Port of Entry Board, so that they can be readily fastened to the windshield of the motor vehicle, and such certificates of clearance and special permits must remain upon the windshield of the motor vehicle

until the trip for which they have been issued has been completed.

The certificates of clearance and special permits provided for in this Act shall be valid only for the specific trip for which the same are issued.

Section 8. . . . There is hereby levied and assessed against motor vehicles described in subsection (e) of Section 6, for the administration of this act and for the maintenance, repair and reconstruction of public highways, a mileage tax, which shall be computed as follows:

(1) Where the gross weight of vehicles and cargo does not exceed fifteen thousand (15,000) pounds, one and one-half (1½) cent per mile from point of entering the state to the point of destination or place of leaving the state;

(2) Where the gross weight of vehicle and cargo exceeds fifteen thousand (15,000) pounds, and does not exceed twenty-five thousand (25,000) pounds, two (2) cents per mile from the point of entering the state to the point of destination or place of leaving the state;

(3) Where the gross weight of vehicle and cargo exceeds twenty-five thousand (25,000) pounds, three (3) cents per mile from point of entering the state to the point of destination or place of leaving the state.

In the event the owner or operator of any motor vehicle described in subsection (e) of Section 6 shall elect to register such vehicle with the Bureau of Revenue and pay the fees required for license plates for said vehicle, then and in such event the owner or operator of such motor vehicle shall be exempt from the payment of said mileage tax.

Section 9. All moneys collected under the provisions of this act by any persons in charge of ports of entry shall forthwith be remitted to the Commissioner of Revenue and by him paid over to the State Treasurer to be by such Treasurer covered into the special suspense fund provided to defray the cost of administering this act.

Section 10. All costs of administration of this act shall be paid from the respective funds for which collections are made by said ports of entry. The proportion of such cost of administration to be borne by each of such funds shall be in the same ratio that the collection for the account of each of such funds bears to the aggregate amount collected by such ports of entry for all of such funds.

The Commissioner of Revenue for the purpose of carrying out the provisions of this act is hereby authorized to create a special suspense fund, with the Treasurer of the State of New Mexico, in sufficient amount to pay the expenses of the administration of this act in conformity with the provisions of this act from the funds benefited through the administration of this act. At the expiration of 6 months after the taking effect of this act, the Commissioner of Revenue shall estimate the amount of funds necessary to carry out the provisions of this act and shall keep an amount available at all times to meet the administrative requirements of the provisions of this act. Any surplus remaining in such special suspense fund shall forthwith be turned into the respective funds of the State of New Mexico to be distributed as provided by law.

At the end of each month the Commissioner of Revenue shall make an accounting of the funds received from the operation of the ports of entry and shall determine therefrom the proportionate charge to each fund.

Section 13. The term "Transportation of Property", as used in this act, shall not only include the transportation of property in or on a motor vehicle, but shall also be construed to include the driving or moving on the public highways of any motor vehicle either under its own power or by being pulled by another motor vehicle where said vehicle or vehicles are to be sold or offered for sale to or by any agent, dealer, purchaser or prospective purchaser.

Section 14. The driving of any motor vehicle into this state for the purpose of transporting passengers for compensation, or transporting property, without the same being first registered and inspected at a registration station or port of entry, and without there being displayed upon the windshield thereof a clearance certificate is hereby prohibited and declared unlawful.

Section 15. Any violation of this act shall constitute a misdemeanor punishable by a fine not exceeding $100.00 or imprisonment not exceeding thirty days or by both such fine and imprisonment. The payment of any fine under the provisions of this act shall not relieve the offender from the payment of any fees or taxes provided by this act or by any other applicable statute of the State of New Mexico or of any other of the provisions of this act, and the vehicle and cargo may be held by the State Cor-

poration Commission, the State Highway Department, the Commissioner of Revenue or any other official authorized to make arrests under the laws of the state, until such fine, special permit fee and costs are paid, and the offending driver may be required by the court imposing such sentence to return to the port of entry through which he should have passed and there comply with all the provisions of this act, with which he should have complied in the first place by the terms hereof. Prosecution for any such violation may be brought in any county in the state in which such driving takes place or in which the driver of such vehicle shall be apprehended.

Section 17. All acts or parts of acts in conflict herewith are hereby repealed.

EXHIBIT NO. III.

CHAPTER 93.

AN ACT AMENDING SECTION 11-331 OF NEW MEXICO STATUTES, ANNOTATED, 1929 COMPILATION AS AMENDED BY SECTION 6, CHAPTER 169 OF THE LAWS OF NEW MEXICO OF 1933 WHICH AMENDED SECTION 6, CHAPTER 77, OF THE LAWS OF NEW MEXICO OF 1931, RELATING TO THE DISPOSITION OF REGISTRATION FEES, COLLECTED UPON THE REGISTRATION OF MOTOR VEHICLES.

House Bill No. 17; Approved February 25, 1935.

Be It Enacted by the Legislature of the State of New Mexico:

Section 1. That Section 11-331 of the New Mexico Statutes, Annotated, 1929 Compilation, otherwise known and designated as Section 31 of Chapter 119 of the Laws of 1929 as amended by Section 6 of Chapter 77 of the Laws of 1931 and as further amended by Section 6 of Chapter 169 of the Laws of 1933, be and the same is hereby amended to read as follows:

11-331 Disposition of Fees.

The fees collected under the provisions of this act shall be paid over to the state treasurer not later than the close of the second business day after their receipt. Not to exceed Six per cent thereof shall be covered into the State comptroller motor vehicle fund, and used to defray the expense of the administration and enforcement of this act and the discharge of such other duties as may be imposed upon the department by law. The remainder thereof shall be distributed by the state treasurer on or before

the tenth day of the month next after their receipt, as follows:

Forty-five per cent thereof shall be placed to the credit of the state road fund to be used and disbursed as other moneys in the state road fund,

Fifteen per cent thereof shall be paid to the county treasurers of the several counties in this state and distributed between the respective counties in proportion that the total amount of registration fees paid for motor vehicles in each county bears to the total amount of such registration fees paid for such vehicles owned in the state, to be credited to the county road fund of said respective counties, and used for the improvement and maintenance of the public roads therein, and to pay for the acquisition of rights of way and material pits at the request of any by agreement with the state highway commission.

Fifteen per cent thereof shall be credited to the state general fund.

Twenty-five per cent thereof shall be paid over to the county treasurer of the several counties of this state and distributed between said respective counties in the proportion that the total amount of registration fees paid for vehicles owned in each county bears to the total amount of such registration fees paid for vehicles owned in the state, and the county treasurer of each county shall distribute the moneys paid to him under the provisions of this paragraph, when received, between the county and school district funds of such county and the various cities, towns and villages therein, in the same proportion that the receipts from general property taxes, other than taxes for state purposes, received by said treasurer for the year in which such distribution is to be made, are so distributed

in such county between said county and school district funds and said cities, towns and villages therein. PROVIDED that in the counties wherein are located cities, towns or villages incorporated, organized and operating under special act, the county treasurer of such county shall pay to the treasurers of said cities, towns or villages a proportionate amount of said money, by him to be distributed in the proportion that the receipts from general property taxes in said cities, towns or villages, bear to the total receipts from general property taxes other than taxes for state purposes received by the county treasurers and the collectors of said cities, towns or villages in the year in which said distribution is to be made. And provided further that for the purpose of effecting an equitable distribution in said counties, the collectors of said cities, towns or villages operating under special act shall, on or before the first Monday in October, certify to the county treasurer and to the state tax commission, the assessed valuation and the total tax rate in said cities, towns or villages for such year. The remainder thereof shall be credited to the State Public School Equalization Fund.